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IN THE

Supreme Court of the United States

October Term, 1957

NATIONAL PRODUCING CO., INC., a corporation, and GEORGE A. HAMID,

Petitioners,

against

FARRIS O. ANDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS A. GAFFNEY,
Counsel for Petitioners,
165 Broadway,
New York, N. Y.

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TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on the 1st day of April, 1958.

Opinions Below

No opinion was rendered herein in the District Court.

The opinion of the United States Court of Appeals is not yet officially reported. A copy of the opinion is included in the Appendix hereto annexed.

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered on April 1, 1958.

Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

Questions Presented

(1) The United States Court of Appeals for the Second Circuit erred in its decision herein in that it affirmed the error (and sanctioned the procedure) of the United States District Court for the Eastern District of New York (Bruchhausen, D. J.) wherein the Court refused to take judicial notice of the pertinent public statute law, namely the Workmen's Compensation Act, of the State of Pennsylvania.

The aforesaid decision should be reviewed on certiorari (under Rule 19-b of the Rules of this Court) for the reasons (1) that the decision is in conflict with the decisions of other courts of appeal on the same matter; (2) that it is in conflict on a federal question with applicable decisions of this Court; and (3) that it has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

(2) The said decision of the Court of Appeals was, moreover, in error (which it is respectfully submitted should be reviewed on certiorari) in that it affirmed the judgment, as against the individual defendant, George A. Hamid, entered upon a verdict which was unsupported by any competent legal evidence.

Statute Involved

The statute involved in the questions here presented is Section 203 of the Workmen's Compensation Act of the State of Pennsylvania (77 Purdon's Pennsyivania Statutes Annotated, Sect. 52), as follows:

> "An employer who permits the entry upon premises occupied by him or under his control of a laborer or assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as his own employee."

Statement of the Case

The action was brought by plaintiff to recover damages for personal injuries sustained by plaintiff alleged to have been the result of defendants' negligence. Jurisdiction was based on diversity of citizenship.

The plaintiff, at the time of the accident, was an aerialist in the employ of one Peaches O'Neill. Plaintiff was one of a group of girls similarly employed. They were hired and paid by Peaches O'Neill, who also provided the rigging (or web) and the other apparatus, upon which the girls' act was performed.

Peaches O'Neill was an independent contractor who, for a consideration, furnished the said act to form part of a circus performance produced by others—in this case by the defendant, National Producing Co., Inc., which was regularly in the business of circus-production.

At the time of the accident (on May 6, 1952) the Peaches O'Neill-act formed part of a circus then being produced

under the sponsorship of the Shriners at the Jaffa Temple in Altoona, Pennsylvania. The Shriner organization had a contract with the National Producing Co., Inc., as general contractor, which produced the circus and assumed for that purpose control of the premises; it was conceded that the Shriners were in no way involved herein.

The National Producing Co., Inc. (as general contractor), had a contract with the said Peaches O'Neill (as subcontractor) whereby Peaches O'Neill agreed to furnish girl aerialists to perform individual aerial web numbers simultaneously, as an aerial ballet; the act consisted in part of the girls assuming certain poses, in and upon the rigging (or web) to music and in unison.

Without attempting to describe the act in detail, it is enough for present purposes to say that in the course of the act, plaintiff fell from a part of the apparatus to the floor about eighteen feet below; and it was plaintiff's contention that she fell because of alleged absence from the rigging of a safety loop.

Upon the trial, a verdict was rendered in favor of plaintiff in the sum of $55,000; and from the judgment entered thereon defendants appealed. Defendants contended upon the appeal, for one thing, that the refusal of the learned District Judge to take judicial notice of the pertinent Pennsylvania Workmen's Compensation Act was error requiring a reversal; and, secondly, as to the individual defendant, George A. Hamid, that there was no competent legal evidence to support a verdict against him.

ARGUMENT

I.

The refusal of the Courts below to take judicial notice of the law of the State of Pennsylvania constitutes error which should be reviewed on certiorari.

(1)

It is undisputed that, inasmuch as the accident happened in the State of Pennsylvania, the plaintiff's right to recover is governed by the law of that State.

Where the trial of an action for damages arising from an accident in the State of Pennsylvania is had in a United States Court held in the State of New York, the Court is bound (by authoritative decisions) to take judicial notice of the law of the State of Pennsylvania.

A leading case is *Lamar* v. *Micou*, 114 U. S. 218, 223, where this Court said:

> "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which *the courts of the United States are bound to take judicial notice, without plea or proof.*" (Italics added.)

To the same effect:

> *Mills* v. *Green*, 159 U. S. 651, 657;
> *Norfolk & Western Ry. Co.* v. *Norton*, 279 F. 32 (6th Cir.).

Applying this principle, it was held in *Slattery* v. *Marra Bros., Inc.* (2nd Cir.), 186 F. 2d 134, 138 (cert. denied, 341 U. S. 915) that the United States Court of Appeals would take judicial notice of the New Jersey Workmen's Compensation Law.

The reason for the different rule applied in this respect in the United States courts from that of the state courts (where each State is for this purpose generally deemed foreign to the others) was pointed out in *Strickland* v. *Humble Oil & Refining Co.* (5th Cir.), 140 F. 2d 83, 86, where it was said:

> "But in a court of the United States no State of the Union is a foreign state. The judge judicially notices the law of them all, and may inform himself in such manner as he chooses."

A like distinction was referred to by Chase, C. J., in *In Re Paramount-Publix Corp.* (2nd Cir.), 85 F. 2d 83, 86; and by Frank, C. J., in *Zell* v. *American Seating Co.* (2nd Cir.), 138 F. 2d 641, 643, where he said:

> "But the federal courts take judicial notice of the decisions of the several states; the doctrine of judicial notice being a rule of evidence, we *must*, under Federal Rules of Civil Procedure, Rule 43 (a), 28 U. S. C. A., following section 723-c, apply it here and take notice of the Michigan decisions." (Italics added.)

(2)

In the case at bar, when plaintiff rested, defendants' counsel asked the Trial Court to take judicial notice of the law of Pennsylvania, particularly section 203 of the Workmen's Compensation Act above quoted. The colloquy that followed, wherein the Court refused defendants' request, is set forth in full in the extract from the record included in the Appendix annexed hereto.

Plaintiff's counsel there contended (in line with the generally prevalent state practice) that for the Court to take judicial notice of the law of Pennsylvania, it must have been pleaded in the answer as an affirmative defense; but in this plaintiff's counsel was plainly in error.

A similar contention was made and an adverse ruling had thereon in *Kaye* v. *May* (3rd Cir.), 296 F. 450, 453; and see also, *Baltimore & Ohio R. Co.* v. *Reed*, 223 F. 689, 697; *Rothschild* v. *Ritter*, 4 F. R. D. 495; and *Bauman* v. *Aluminum Co. of America*, 58 F. Supp. 160, 162. In the case last cited it was held by the learned judge in the District Court, Eastern District of New York, that not only must the Court take judicial notice, *without plea or proof*, of the law of another state (Arkansas), but that when such law had been pleaded in the answer as an affirmative defense, it would be stricken.

Defendants' counsel, at all times throughout the colloquy, continued to urge that the District Court should take judicial notice (without plea or proof) of the Pennsylvania statute; and counsel never abandoned or changed his position in this respect.

In view, however, of the plaintiffs' insistence that the law of another state must be pleaded, defendants' counsel said that while he really did not feel an amendment was necessary, nevertheless "as a matter of form," he would move that the answer be deemed amended to set forth the statutory law in effect in Pennsylvania, consisting of Section 203 of the Pennsylvania Workmen's Compensation Act (Appendix, pp. 13a-14a).

Judge Bruchhausen reserved decision on the motion, and on the question of taking judicial notice, pending the luncheon recess; and after the Court reconvened he announced that, considering all the factors, he denied the motion to amend, and he said further that, in view of the denial, he deemed it unnecessary for him to determine whether or not judicial notice should be taken. Thereupon defendants' counsel sought repeatedly a specific ruling on the question of judicial notice; and it ended with the Court saying (of the application to take judicial notice) that it was denied (Appendix, pp. 18a-19a). So that the net result and final outcome was that the Court refused to

take judicial notice of the Pennsylvania statute. The further net result was that the case was tried with only part of the Pennsylvania law (the *lex loci*) before the Court—to great injustice to the defendants.

The denial of the motion to amend had nothing whatever to do with the outstanding and fundamental right to have the Court take judicial notice of the law of Pennsylvania; and the learned Judge was in error in holding otherwise.

As a result, by reason of a purely technical procedural position, assumed by plaintiff and adopted by the Trial Court, defendants have been deprived of their undoubted right to have the case heard and disposed of in accordance with the law of the State of Pennsylvania—where the accident occurred.

Defendants' counsel, as an additional reason why the Trial Court should take judicial notice of the Pennsylvania statute, had referred to Rule 43-a of the Federal Rules of Civil Procedure, to the effect that all evidence should be admitted in a United States court which would be admissible under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court was held; and defendants' counsel said that this rule should be read in conjunction with Section 344-a of the New York Civil Practice Act, which authorized the state courts to take judicial notice of the statutes of a sister state.

The Court of Appeals herein was apparently of the opinion that by making specific reference to Rule 43-a and Civil Practice Act, Section 344-a, defendants' counsel had waived any right to rely upon the well recognized rule of law that federal courts are bound to take judicial notice of the public statutes of every state; but such was not defendants' position, nor did it have any such effect.

As above stated, at all times defendants' counsel stressed and insisted upon the application herein of the

general principle that federal courts are bound to take judicial notice of the law of the several states.

It will not do to say (as may the plaintiff's counsel) that the Pennsylvania statute, by its terms, would not apply herein; for here the defendants were precluded at the threshold from any consideration of the scope, operation or extent of the Pennsylvania statute.

Consideration of the meaning and purpose of the Pennsylvania statute might well have been had herein, were it not for the fact that defendants were foreclosed therefrom by the erroneous ruling of the learned Trial Judge that he would not take judicial notice of the statute. That there was no discussion or interpretation of the statute was due solely to plaintiff's attitude. It may, however, be added that, under the relevant Pennsylvania decisions, the instant case (where, as above pointed out, National Producing Co., Inc., was the general contractor and Peaches O'Neill, plaintiff's employer, was a sub-contractor) apparently comes well within the statute (*McDonald* v. *Levinson Steel Co.*, 302 Pa. 287, 294; *Sarne* v. *Baltimore & Ohio R.R. Co.*, 370 Pa. 82; *Rivera* v. *Turner Construction Co.*, 135 F. Supp. 553, interpreting the Pennsylvania statute).

II.

The case presents other errors of law which should be reviewed on certiorari.

It was conceded that plaintiff could succeed against the individual defendant, George A. Hamid herein, only upon proof that there existed (at the time of the accident) a partnership between said Hamid and one Robert H. Morton (deceased at the time of the trial) who was the active factor in the circus production. Defendants contend that there was no competent legal evidence of such partnership.

(1) To establish the alleged partnership, plaintiff offered in evidence a certificate of a partnership (dated April 20, 1944, more than eight years before the accident) between three persons, Hamid, Morton and one Barry—the partnership to be known as "Hamid-Morton-Barry"; by the terms of the certificate, the partnership was to be formed to organize and operate an out-door circus *exclusively* in the Dominion of Canada for a period of three years from the date of the agreement, the circus to be known as the Hamid-Morton Circus; any extension of the partnership had to be endorsed by the parties at the foot of the agreement, and no such extension or endorsement was ever had—actually the partnership was terminated (according to the uncontroverted testimony) within about four to six weeks after its formation.

To deduce (as did the Courts below) from the defunct partnership between three persons, the existence of a different partnership between two persons, eight years later (especially without any proof of what happened in the intervening six-year interval) was obvious error.

(2) Plaintiff based her argument for a partnership between Hamid and Morton mainly upon matters contained in a book entitled "Circus."

This 253-page volume recited on its title page that the book was "*by George A. Hamid, as told to his son George A. Hamid, Jr.*" The matters related in the book by Hamid, Jr. (as appears from the aforesaid inscription on the title page) were plainly hearsay—they were incompetent against the defendant for any purpose. The testimony of defendant Hamid (and it is uncontradicted) was that the book was published in 1950 while he was in Europe; he never saw it until his return; he first read the book in the winter of 1951—after it was published; when the Court suggested that only pertinent parts of the book be read in evidence, plaintiff's counsel insisted that the book as a whole (with all its loosely-made hearsay statements) be put in evidence, and it was so marked.

Because the book was copyrighted, and the application for copyright contained a recital that George A. Hamid was "author", plaintiff contended that all the substantive statements made in the book (without regard to time or context) *must be taken as true* and as admissions made by and receivable against the defendant Hamid. Recitals in the application or in the certificate of copyright are manifestly there included for a specific purpose—it is not to affirm as true all the statements (obviously hearsay) contained in the copyrighted volume.

(3) To bolster up the plainly insufficient proof of the alleged partnership, plaintiff's mother was called upon to testify to an alleged conversation with Colonel Morton, who had died before the trial. Upon established principles, the testimony was inadmissible (68 C. J. S. "Partnership", Sec. 53, p. 901, citing *Murphy* v. *Oversmith*, 242 App. Div. 901 (N. Y.), where it was said that "Declarations of one partner that another is his partner are not competent to establish the partnership"; and *Pryor* v. *Hale-Hassell Grocery Co., Inc.*, 80 F. 2d 995, 997 (10th Cir.), where it was said that such declarations are only admissible after a *prima facie* showing of partnership has been made by other evidence"—which (as hereinabove pointed out) was wholly lacking in the instant case.

Reasons for Granting the Writ

The reasons for granting the writ herein, pursuant to Rule 19 (b) of the rules of this Court, have been set forth on page 2 hereof.

CONCLUSION

Petitioners respectfully submit that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

THOMAS A. GAFFNEY,
Counsel for Petitioners.